

Law, courts and populism: climate change litigation and the narrative turn

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Climate Change Litigation and the Narrative Turn: Law, Courts and Populism

Abstract

Climate change litigation has become an increasingly common feature of the modern legal landscape. Populism has, likewise, become commonplace within the political landscape, and the interaction between populism and the courts is the subject of a growing literature. This chapter considers the connections linking the two fields, considering in particular whether climate change litigation can be said to be populist in nature. Based on a survey of relevant cases, I develop two categories – populist legalism and legal populism – the former relating to the nature of the parties involved in litigation and the latter to narrative style employed in legal submissions. I argue that there are both benefits and distinct risks in borrowing from the populist playbook. While the chapter is focused on climate change litigation, its framework and conclusions are likely to be more broadly applicable to other policy fields examined by law and courts scholars.

Introduction

Around the world, the politics of climate change has become increasingly judicialised. Frustrated with slow and inadequate action on both mitigation and adaptation, NGOs and citizens have turned to the courts to address the defining existential issue of our age. Climate change is of course not the only global crisis of recent times. The world has faced a financial crisis followed, in many countries, by a long period of austerity and rising levels of social inequality. The West in particular has also been experiencing a migration crisis associated with regional conflict, climate and resource pressures and sharp disparities in wealth. These latter crises have been accompanied by a rise in populism. The election of Donald Trump in the US and Brexit in the UK represent two of the most striking manifestations of this political phenomenon; however, populist parties and leaders have been on the march more widely across Europe and Latin America.

The current chapter seeks to explore the links between climate change litigation and the politics of populism. If we fail to look at populism, we will have an incomplete picture of climate change litigation. Equally, any study of populism which does not consider litigation and the courts is also likely to be incomplete. My aim is to analyse the extent to which climate change litigation can be seen as an example of populism. This does *not* involve an empirical content analysis of climate litigation cases to determine how far populist frames (such as ‘people’ or ‘elite’) feature in legal submissions by the parties or in case judgments. While this type of approach is found in comparative politics studies of populist parties (Caiani and della Porta 2011), such an explicit populist rhetoric in these terms tends to be lacking in climate legal cases in any event.

Instead, I begin by defining populism both as an ideational political strategy and, separately, as a political style or form of discourse. Based on this, I then survey a number of climate litigation cases globally in terms, first, of the type of defendant and the type of claimant and, second, the style of argument used in court. In examining defendants and claimants, I draw on populism defined as a political strategy. Where a case fits my definition of populism on this count, I label this as an example of ‘populist legalism’. When analysing style of argument, I draw on populism as a political

style. Style of argument here refers not to the content of the language used in legal submissions (which, as I have indicated, is mostly unlikely to have populist terminology), but rather to a story-telling or narrative approach found in them. The focus is on submissions because the operative parts of judgments seldom contain similar storified language. Where a narrative style is employed in submissions, I label this as ‘legal populism’.

Beyond this examination of the case law (which is illustrative rather than exhaustive), the chapter also has a normative component. First, I argue that there may be some strategic advantage to populist legalism – in other words in thinking about the type of defendant and the type of claimant in populist terms. The environmental movement may gain something by employing populist framing of defendants and claimants in their publicity around cases. As for the adoption of a populist style of argument in climate change litigation, which is a relatively new phenomenon, I argue that there are obvious risks as well as benefits associated with legal populism. The benefits come from more effective climate change communication. However, the risk of taking a narrative-type approach to cases instead of focusing on climate science and law is that, by taking a page from the populist playbook, the climate movement may end up undermining the very expertise it relies on in the longer term. As a recent (otherwise unrelated) headline puts it: ‘Don’t let the story get in the way of a good truth’ (Salmon 2018).

The chapter is structured as follows. I start with a brief outline of the literature on climate change litigation in order to situate my study within it. I then consider populism, setting out the definition that is used for my analytical framework. Next, the chapter moves on to consider the largely still emerging literature on populism and the courts. The relationship between the two is complex: populists may seek to constrain an independent judiciary; courts can be mobilised by populists or can themselves be populist; however, populism can also be resisted via the courts. This is then followed by a brief discussion of the link between climate change and populism, and of narrative approaches to climate change, before the chapter turns to its main focus on climate change litigation and populism.

Climate Change Litigation

Climate change litigation has involved ‘proactive’ cases against governments and corporations, relying on both judicial review and tort claims, as well as ‘reactive’ litigation, where climate protestors end up in court as defendants having been prosecuted for taking direct action against climate harm (Hilson 2010, 2012; Hayes 2013). However, the tide has not all been in one direction: industry has also instigated ‘anti’-climate change litigation in a fight against tighter regulatory controls (Hilson 2010; Markell and Ruhl 2012; Setzer and Bangalore 2017) and via SLAPP¹ suits targeted at climate activists and NGOs (Hilson 2016).

Although climate change litigation has been widely examined by legal scholars (Fisher et al. 2017; Gerrard and Wilensky 2016; Ghaleigh 2010; Lin 2012; Lord et al. 2011; Peel and Osofsky 2015), it has arguably not received the attention it deserves by the law and courts community within political science and sociology (Vanhala and Hilson 2013). There are of course exceptions. Work within

¹ Strategic lawsuits against public participation.

comparative politics has, for example, examined whether the amount of climate litigation in a country is associated with the presence of a specialised climate legislative and regulatory framework (Vanhala 2013). The literature on social movements has informed research on how framing has been employed within climate change cases (Franta 2017; Hilson 2018; Nosek 2018) and how climate protectors in reactive litigation have themselves been framed by others (Hilson 2012). Social movement-based studies have also considered the link between expert testimony and collective movement memory (Hayes 2013), and the potential explanatory causes of climate change litigation, including resources, legal and political opportunity structures and grievance (Hilson 2010).

Empirical work has, in addition, grappled with the *outcomes* of climate change litigation. Markell and Ruhl (2012) consider the balance between pro and anti climate suits in US courts, finding that “anti litigation has had at least as much traction in the courts as pro litigation, though neither thrust has seen much success” (66). Keele (2018) builds on their study, bringing it up to date by examining US case law from 2010, although limiting it to NEPA² cases (which make up the bulk of US climate litigation in any event). Hers is also the first study to apply an attitudinal model of judicial decision-making to climate change litigation (i.e. examining whether judges’ political preferences predict case outcomes better than the way the legal rules point). Her results show only limited support for the attitudinal model in the District Courts, and no evidence for the Court of Appeals. Setzer and Bangalore (2017) examine climate cases worldwide in order to assess whether the result of the judgment can be said to have enhanced, hindered or had no impact on climate regulation. The data they analyse suggests that, overall, courts play an enhancing role.

The current chapter seeks to add to this existing literature by examining the link between climate change litigation and populism, which has yet to be considered. Although my focus is on climate change, the novel concepts of populist legalism and legal populism I develop have a potentially broad scope of application. The chapter thus has significance for a range of other policy areas where populism may be relevant to attempts to secure social change via litigation.

Populism

Populism is not a new phenomenon – examples from history abound, including for example, the eponymous party born out of agrarian radicalism in 1880s America, and Peronism in Argentina of the 1940s. Although more typically associated with the right today, it is also found on the left, with Bernie Sanders’ 2016 presidential campaign in the US and Hugo Chávez in Venezuela often cited as instances of the latter. Trying to find a common denominator amongst such variety is not easy. A useful place to start is the definition provided by Jan-Werner Müller (2017). Müller states that populism “is a particular moralistic imagination of politics, a way of perceiving the political world that sets a morally pure and fully unified – but Ultimately fictional - people against elites who are deemed corrupt or in some other way morally inferior” (19-20). As he observes, both of these core elements – in other words anti-elitism and a unique claim to be representing the real people – are necessary, because criticism of powerful elites is fairly routine and cannot, by itself, amount to populism therefore. Equally, appeals to the people are politically commonplace and so Müller adds that “[f]or a political or movement to be populist, it must claim that a part of the people is the

² National Environmental Policy Act.

people – and that only the populist authentically identifies and represents this real or true people (22-23). For populists, in other words, “only some of the people are really the people” (21). In democratic terms, populists typically claim to represent the sovereign will of the people which only they can truly divine.

Moving beyond Müller, it is at this point worth considering populist hostility towards ‘elites’ more closely. They are distrusted because they are seen as responsible for the problems facing the ignored real people. The elite may include one or more of the ruling political class, big business, economists, the civil service, the media, the judiciary and academics (including scientists). The antipathy of populists towards many of these groups often also extends to the ‘expertise’ which they propound. In its place we find post-truth politics, where inconvenient facts are dismissed as ‘fake news’ and where emotions and affect replace rationality and expertise (Speed and Mannion 2017). Comments by Donald Trump about clearing the Washington swamp, or by Michael Gove, a leading Brexiteer, that the British people had ‘had enough of experts’ provide two clear examples of this kind of anti-elite and anti-expertise populist rhetoric.

A number of other definitions of populism draw attention to its tendency to involve some form of social othering – not just of elites, but also of those who the elites have supposedly either been favouring instead of the majority or failing to control (Ostiguy and Casullo 2017). Migrants and minorities are the typical targets of right populism, with alleged failures on immigration control and minority rights protections attracting particular ire. For left populists, the Other is more likely to be the so-called 1% of the richest in society (Ostiguy and Casullo 2017), which means that here, one ends up eliding the Other with a wealth-based elite.

The above involve ideational approaches to populism – in other words populism is seen as an ideology, albeit a ‘thin’ one (Mudde and Kaltwasser 2017) that typically overlays other more substantive ideologies such as neo-liberalism or socialism that, again, make it right or left leaning respectively. They also conceptualise populism as a *political strategy* aimed at mobilising broad popular support (Oxhorn 1998) from largely unorganised masses (Weyland 2001). As Weyland notes, this encapsulates both classical populism, where these masses were offered the franchise, and neopopulism, which appeals instead to the unorganised who distrust existing political parties. Support is mobilised by an often charismatic leader, and the connection between them and the people tends to be direct, with little in the way of institutional party-based intermediation. Such leaders win their support by targeting the marginalised and excluded and promising to protect them from crises and threats from others in a way that current corrupt elites have failed to do (Weyland 2001).

However, populism has also been viewed as a form of discourse and as a *political style* (Moffitt 2016). Instead of being a set of political beliefs that informs a political strategy, populism is regarded as “a particular mode of political expression” (Moffitt 2016, 21), evident in text, speech or wider performative style (such as being ‘bad-mannered’). The difference is important because while those who adopt the ideological view of populism “tend to see it as an ‘either/or’ category”, those viewing it as a discourse or a political style typically see it in more gradational terms so that a political actor can be “more or less populist at different times” (21).

For the purposes of the present chapter, I adopt both a political strategic and a political style approach to populism. As will be seen later, in the section on climate change litigation and populism – drawing notably on Müller – I argue that a case is populist if it both:

- 1) challenges elites as defendants, including, potentially, the expertise on which they rely; and
- 2) is brought by a claimant that can be considered as representing ‘the people’ or who has the financial backing of a populist party or movement.

I also argue that a case can be considered populist to a degree if:

- 3) the style of argument used by claimants in the case relies on narrative, appealing to emotion over the expertise of science and law.

Populism, the courts and constitutionalism

Populism is often associated with a degree of hostility towards courts, stemming in part from the fact that judges form part of the elite, but also because, as counter-majoritarian institutions,³ the courts may be seen as interfering with the authentic will of the people. In recent years this hostility has most often featured as an aspect of right populism, with populist governments such as those in Poland and Hungary attempting to bring the courts under political control (Baczynska 2018). However, Roosevelt’s problematic relationship with the right wing Supreme Court during the New Deal era (Leuchtenburg 2005) illustrates that left populism can also find itself wary of the courts.

That is not to say that populists are necessarily anti-constitutional. They tend to have a preference for populist (Parker 1993) or ‘popular’ (Kramer 2004) constitutionalism, which is distrustful of judicial supremacy and prefers interpretation and enforcement of the constitution to be in the hands of the people instead. In institutional terms, populists are more likely to support ‘political constitutionalism’ (Bellamy 2007), where constitutional rights are protected via elected parliaments rather than by the unelected judges of ‘legal’ constitutionalism. Insofar as courts are upholders of human rights, this marks them out for attack by right populists because human rights are connected with the liberal elite (Hopgood 2016) and their protection of ‘othered’ minorities against majority preferences.

Beyond rights, the separation of powers is another core aspect of constitutionalism. This is of course the key concern with government ‘reforms’ of the judiciary mentioned above in countries such as Poland. In separation of powers terms a judiciary that is independent of the executive obviously poses more of a threat to populist government programs. Where possible, populist leaders may therefore seek to fill courts with their own, populist appointments or have judicial power curbed in other ways. Nevertheless, as Arato (2017) notes, unlike authoritarian dictatorships, populist governments seldom seem to dismantle the independence of the judiciary altogether. The – at least surface – legitimacy that courts provide is respected, even if the institutions themselves are severely undermined.

While the above focuses on the populist’s perspective of constitutionalism, there is of course also the opposite perspective of those seeking to restrain or counter populism. Here, observers have

³ Cf e.g. Dotan (1998) who has questioned the empirical evidence for courts being counter-majoritarian).

pointed to the potential for constitutional machinery to act as a form of resistance to popular pressure (Hailbronner and Landau 2017). In the context of Trump's attack on US environmental regulation for example, the separation of powers may not prevent him from cutting budgets and limiting enforcement, but it does impact on the potential for legislative dismantling (Biber and Farber 2017). Populism may also be resisted via the courts. The UK *Miller* case⁴ provides a good example here, involving as it did a judicial review challenge to the Brexit constitutional process. This can, however, produce backlash, as when the High Court judges in the case were labelled by the Daily Mail, in distinctly populist terms, as 'enemies of the people'.

The courts can also be mobilised by populists, as in the UK *Dimmock* case,⁵ where the claimant challenged the legality of showing Al Gore's climate change film, 'An Inconvenient Truth', which he considered to be propaganda, in English schools. Finally, courts can themselves take on the mantle of populism. That might involve a progressive form of populism such as where the Indian Supreme Court has taken on environmental cases on its own initiative in order to protect the poor (Baxi 1985). This of course carries its own risks, including undermining or disempowering the long term capacity or willingness of other branches of government to take on the roles they should be carrying out (Rajamani 2007). Alternatively, courts may themselves adopt an anti-progressive populist stance as has been seen in recent years in Turkey, where constitutional amendments introduced in 2010 have given rise to examples of what Oder terms 'judicial populism' by the Constitutional Court (Oder 2017). In such instances, rather than acting as liberal counter-majoritarian institutions, the courts are instead supporting majorities or at least perceived majorities.

Climate change and populism

Donald Trump's action to withdraw the US from the international Paris Agreement is perhaps the most striking example of the link between populism and climate change. As Lockwood (2018) notes, right wing populists and their parties tend to be climate sceptical in orientation (whereas left populists generally are not). He assesses two potential causes of their hostility to climate science and policy: first, an interest-based approach which locates it in a fear of the economic consequences of decarbonisation of the economy on the 'left behind'; and second, an ideological stance which is more about nationalism and anti-elitism. Lockwood argues that the data supports the latter explanation – in other words, right populists are hostile towards climate policy because they see "climate change as a cosmopolitan elite agenda, along with a suspicion of both the complexity of climate science and policy and of the role of climate scientists and environmentalists" (713).

Not everyone has viewed the link between climate change policy and right populism in these terms. Writing in 2009 – before the current round of post financial crisis populism, but while the earlier neo-liberal populism that commenced in the Reagan era was still playing out –Swyngedouw (2010) argued that climate change policy had been hijacked by this neo-liberal populism. He pointed to classic populist characteristics of the dominant climate discourse, with talk of the threat to global humanity as the 'people', CO2 as the external 'other', and with the whole agenda being to present the solution as one within capitalism (for example via carbon trading) rather than something that

⁴ *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁵ *Dimmock v Secretary of State for Education & Skills* [2007] EWHC 2288.

questions it as the root cause of the climate crisis. In other words, rather than climate change 'changing everything' in Naomi Klein's (2014) words, environmental populism supports the capitalist socio-political status quo "such that nothing really has to change" and "so that life can basically go on as before" (Swyngedouw 2010, 223).

In contrast to right wing versions, progressive or left populism is generally more supportive of action to address climate change. The Italian left populist Five Star Movement, for example, is very much in favour of EU policy on sustainable development and climate change (Fioramonti 2018). Similarly, in the US, Bernie Sanders is a firm believer in climate science, the fact that climate change causes devastating harm, and the need to transition to a fossil-fuel free economy.⁶ And Daniel Ortega, the left populist president of Nicaragua, initially refused to sign his country up to the Paris Agreement – not through antipathy to climate change, but because Paris failed to go far enough and did not respect the principles of climate justice (Taylor 2017).

The narrative turn in climate change

Narrative approaches and stories now abound in relation to climate change such that one might well identify a narrative turn. Drawing on linguistics, Fløttum and Gjerstad (2016) examine how climate change is communicated via narratives. As they state:

Stories used to communicate climate change knowledge and politics have a prominent role in shaping opinions and preferences related to climate change. We claim that the narrative perspective helps to identify different actors, realized as narrative characters (hero, victim, villain) and to explain the presence/absence of typical components in a 'story' (2).

They then employ this narrative perspective to analyse and explain a number of case study policy documents on climate change. In doing so they point to an important distinction between frames and narratives. While noting that narrative "is often used in a pretheoretical and imprecise way to refer to various kinds of language representations of some length", they define the two as follows:

framing corresponds to the process which implies a strategic selection (conscious or not) of language features for a particular purpose; narrative is used to represent a specific kind of text/talk structure with a 'storyline' (in contrast to other structures such as argumentative, descriptive, and explicative) which can be realized through different genres such as fairy tale, novel, reportage (2).

This is an important distinction for the purpose of this chapter. While I would contend that a narrative approach as a form of climate change communication can also be adopted strategically (the *Juliana* climate change litigation case discussed below being a good example), Fløttum and Gjerstad's definition usefully highlights the difference between the selection of certain features involved in framing (as when a photographer selects what to frame in a shot), and the more complex structure of a storyline with its various components including characters and plot.

⁶ <https://berniesanders.com/people-before-polluters/>.

Jones and Peterson (2017) situate narrative approaches to climate communication as arising from past attempts which “assumed that a lack of accurate information drove public disinterest and disbelief.” In place of this now discredited deficit model of public understanding, more recent work on climate communication within public policy suggests that narratives or story telling are much more effective, especially when tailored to particular audiences. How you tell people things is, in other words, as if not more important than what you tell them. As Jones and Peterson put it: “The idea of telling a story seems obvious, but many of those who communicate climate change have embraced the idea that people only need more accurate information for so long that maybe it is not obvious.”

While narratives are thus clearly important within climate communication, McGuire and Lynch (2017) remind us of the need to consider *who* is doing the communicating. Noting that narratives become particularly compelling during times of crisis, conflict and change, they draw attention to government in particular for its role in integrating narrative into its legal and institutional frameworks on climate change.

Turning to litigation, it is clear from the field of sexual harassment that while there are undoubted benefits of individuated stories that legal cases often involve (not least because “Legal complaints as stories with characters, place, time, and events fit well with news reporting” (Sterett 2018, 10), there are also potential downsides. Chief among these is that wider systemic issues around sex discrimination can easily get crowded out and remain unseen (Sterett 2018).

Nosek (2018) considers narratives in climate change litigation. However, narratives for her are really frames with particular content rather than narrative as story-telling. Drawing on the work of Osofsky and Peel (2016) and also psychology literature, she argues that certain frames evident in climate change litigation are more likely to resonate with the US public than others. Nosek identifies parallels between frames in the Our Children’s Trust *Juliana* case and the previously successful framing of public health campaigns against smoking and the tobacco industry. One of these is an innocent victims frame:

Some scholars have argued that the evidence around second-hand smoking, and the realization that smoking was claiming innocent victims, was key to the reframing of the public debate around smoking. There is a pervasive climate change narrative that everyone is responsible for climate change and thus, in a sense, nobody is responsible. But it is much harder to argue that an eight-year-old is responsible for climate change (Nosek 2018, 791).

Another is a knowing deception frame – in other words, the public is likely to react more forcefully given that climate change, as with tobacco in the past, has involved government and industry continuing with the status quo despite long-term knowledge of the risks. As Nosek states, “Framing a public health risk as intentionally created also influences how the public apportions blame for that risk” (791). However, although framing is clearly important in climate change (Osofsky and Peel 2016) and climate change litigation (Nosek 2018; Hilson 2018), and while one might equally examine populist frames used in legal mobilisation, or in political discourse (Caiani and della Porta 2011), the main focus in the current chapter is on narrative as story-telling and not on framing. The former is predominantly a style of communication whereas the latter is much more about its substantive content.

Climate change litigation and populism

To what extent can climate change litigation be considered an example of populism? Recalling the definitions of populism from earlier in the chapter, I contend that a case is populist if it fulfils both of the following:

- 1) it challenges elites as defendants, including, potentially, the expertise on which they rely;
- 2) it is brought by a claimant that can be considered as representing ‘the people’ or who has the financial backing of a populist party or movement.

In order to distinguish it from style-based legal populism, considered below, I have chosen to call cases that meet these conditions examples of populist legalism. The first of the two conditions, while necessary, is obviously not sufficient because the target of virtually all climate change litigation is the elite – whether government or industry (including the fossil fuel industry elite). This would make *all* progressive climate change litigation an example of eco-populism, which seems too broad to be analytically useful. The first, anti-elite or anti-expertise element thus has to be accompanied by the second, people element or, alternatively, populist financial support. This will typically rule out climate change litigation brought by NGOs in their own names, such as the *Urgenda* case against the Dutch government,⁷ even though in that case the Urgenda Foundation was representing around 900 Dutch citizens. Likewise, it excludes a case such as *Kivalina*⁸ where a marginalised Native American community in Alaska impacted by climate change sued ExxonMobil (unsuccessfully) for the cost of resettlement. They are, after all, only a subset of the people and are unlikely (especially by those on the right) to be seen as representing the whole of it. The same is true of the Peruvian farmer’s action in the German courts against the fossil fuel company RWE, claiming that its emissions were in part responsible for the melting glacier threatening his home with flooding.⁹

It would, though, include the previously mentioned *Dimmock* case, involving a challenge to the screening of Al Gore’s ‘Inconvenient Truth’ in state schools in England. Stuart Dimmock, a parent, lorry driver and school governor, argued that there was a need for political neutrality in schools under the Education Act and that the Gore film breached this principle. The court held that the film was predominantly based on sound climate science and could be shown; however it ordered guidance to be issued to teachers to draw attention to the points where the film went beyond the accepted science. Funding for Dimmock’s challenge was organised by Viscount Monckton, a leading figure in the climate change denial movement, which makes the challenge to climate-science based education (with Gore of course also a key member of the climate elite) a populist one. Without this funding element, it would satisfy (1) above but not (2), as Dimmock made no particular claim to be speaking on behalf of the people.

The analysis of the above cases is, it should be noted, a descriptive one. It considers whether a relevant case is or is not populist in a populist legalism sense. It is, nevertheless, worth pausing to consider normatively whether a climate change litigation case should strategically be crafted so as to

⁷ *Urgenda Foundation v. The State of the Netherlands* (2015) and, on appeal, *Netherlands v. Urgenda* (2018)..

⁸ *Native Village of Kivalina v. ExxonMobil Corp* 696 F.3d 849 (9th Cir. 2012)..

⁹ *Lliuya v. RWE* (ongoing)..

have a more populist slant in claimant terms. After all, a case that is won by the people – perceived by as many as possible as the real people – is more likely to resonate with wider society than one which speaks only to a smaller subset. If one takes the recent claims brought by US cities – San Francisco and New York – against the fossil fuel industry for example (Levin 2018), then not only are these, again, not really populist in the descriptive sense above (because people in these liberal coastal cities are not easily viewed as representing a homogenous US people), but also the suits are unlikely to appeal to a broader more sceptical audience who can too easily dismiss them as ones brought by a ‘liberal’ elite. Strategically, one might therefore question them in normative terms, if the aim is to appeal to a wider audience.

There are, however, a number of recent examples of climate change litigation which do fit the bill, both descriptively (in terms of (1) and (2) above) and normatively. These are cases which have been brought by claimants who resemble a more populist looking people. *Juliana* is one such case, involving as it does youth from a range of backgrounds, including from farming families. Although one might argue that they are young people rather than the people as a whole, the inclusion of farmers for example very much ties in with a producerist agrarian populism that featured in earlier eras of American history (Müller 2017). In this sense, as claimants, they speak beyond their youth. Other, European, examples include the Swiss grandmothers case¹⁰ (because again, while in one sense representing a specific age group, grandmothers are also somehow emblematic of the wisdom and common sense of the people as a whole) and, more obviously, the People’s Climate Case, in which ten ‘regular families’ from the EU and other countries including Kenya and Fiji are taking the EU institutions to court requiring them to take stronger action to protect their livelihoods and human rights.¹¹ Although a more cosmopolitan version of the people than one finds with traditional populism, the case remains notable for its distinct populist framing of the claimants.

Finally, beyond the all or nothing quality of the above classifications (reminiscent of the ideational approach to populism discussed earlier), I suggest that a case can also be considered populist in a more gradational sense if:

3) the style of argument used by claimants in the case relies on narrative, appealing to emotion over the expertise of science and law.

I have termed this use of a populist legal style as legal populism. The *Juliana* case is, again, a good example with its use of individual narratives or stories about how climate change is already impacting and will continue to impact the various youth plaintiffs in the case. Thus, for example, in one of the youth testimonies in the plaintiff submissions we are told the story of Alex:

Alex lives on his family’s 570-acre farm, the Martha A. Maupin Century Farm (‘Maupin Century Farm’), located along the Umpqua River. His great, great, great, great grandmother, Martha Poindexter Maupin, founded the farm in 1868 (she was one of the first women in Oregon to own a ranch) after arriving in the area by way of the Oregon Trail. The Maupin Century Farm is Alex’s intellectual and spiritual base and a foundational piece of his life and heritage, and his identity and wellbeing depend on its preservation and protection. However, the drought conditions, unusually hot temperatures, and climate-induced

¹⁰ *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council* (ongoing)..

¹¹ <https://peoplesclimatecase.caneurope.org/>.

migration of forest species are harming and will increasingly harm Alex's use and enjoyment of the Maupin Century Farm (para. 24).

This is a classic narrative style (and just one of many in the same vein). It appeals to affect as a result of the effect of climate change. It is probably going too far to suggest that *Juliana* is a pure example of legal populism in this narrative sense. The plaintiff submissions do, after all, also contain a significant amount of technical, expert argument in terms of both law and also climate science. However it is seeking to elicit an emotional response to the plight of those affected – something that ordinary people can relate to. In this sense it is, in this part, somewhat anti-expert in nature. The science features but it plays second fiddle because the narrative style inevitably and deliberately dominates. It communicates better and was no doubt chosen strategically for just this reason. Even the expertise of law takes second place to people's experience.

If the advantages of adopting this style are obvious in climate communication terms, the risks are perhaps less so. However, there are risks in this use of the legal populist playbook by claimants. Appealing to emotion over reason, and emphasising, as one of your heroes in the story, someone with a frontier agrarian history, may well help you connect with a wider range of people. Work within climate communication studies tells us that, to communicate effectively in relation to climate change, you have to appeal to values that go beyond your own: people are more likely to listen if you meet them on their ground, addressing their concerns and appealing to their values (Hayhoe 2018). Talk of family, fishing, and farm tradition no doubt does this (although whether it will speak to those in the rust belt whose jobs depend on fossil fuels is another matter – Fraser 2018). The risk though, is that it plays into a populist, post-truth world (with post-truth defined by the OED as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”). Any short term advantage in communication terms may simply end up chipping away at the currency of the expert discourses of science and law in the longer term.

Conclusion

There is, as we have seen, an emerging academic literature on populism and the courts. However, much of this is centred around the literature on constitutional law and theory rather than looking, as this chapter has, at how populism plays out in legal mobilisation. The latter has involved consideration of, first, the type of defendant and the type of claimant, and second, the style of argument employed in court. The former, populist legalism, is in part a descriptive notion which, in the current chapter, I have showed can be tested empirically. In this sense, some climate change litigation cases can be described as examples of populist legalism and some cannot. In style terms, cases may also be analysed empirically for the degree of legal populism they exhibit. However, both populist legalism and legal populism also have a normative component, inviting a strategic choice by social movement actors on the extent to which they wish to employ populist elements in their litigation proceedings (whether that be via, for example, people centred claimant framing in the case of populist legalism, or narrative style submissions in the case of legal populism)

Discussing climate change litigation (and indeed other forms of social movement litigation) and populism raises difficult questions. Is progressive strategic litigation which relies on populist cues a

good thing? Why is that? Is it because it works, instrumentally, like Boris Johnson the populist UK Foreign Secretary, suggesting that a Trump-like chaotic, endanger everything approach to Brexit negotiations might have been a good idea (BBC 2018)? And how far should you go in trying to get it to work in communication terms? Should environmentalists be trying to reach out to right populists via their litigation communication (both within and beyond the courtroom)? Or should litigation just be used against them? Alternatively, is it because an attempt to ensure your case represents and thus reaches the people offers democratic advantages? If so, what does that mean for marginalised minorities who are unable to play this game but for whom litigation remains crucial in defending their rights? These are all important questions which future research on legal populism should aim to answer.

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